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VIA EMAIL AND U.S. MAIL

California Energy Commission
Dockets Office, MS-4
1516 Ninth Street
Re: Docket No. 08-GHG OII-1
Sacramento, CA 95814-5512

Re: Greenhouse Gas Emission Impacts of Power Plants (Docket No. 08-GHG OII-1)

Dear Commissioners Byron and Douglas:

We appreciate the opportunity to provide these comments on the California Energy Commission's (CEC's) Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act (CEQA) Requirements Relating to Greenhouse Gas Emission Impacts of Power Plants, Docket Number 08-GHG OII-1, Order No. 08-1008-11 ("OII").

I. EXECUTIVE SUMMARY

At the end of the second workshop for the OII, Commissioners Douglas and Byron requested specific approaches for how the CEC can address greenhouse gas (GHG) emissions in its CEQA-equivalent licensing process during the "interim" period before the California Air Resources Board (CARB) implements regulations under AB 32. As outlined below, we propose a "three step" approach for the CEC to quickly adopt an interim, CEQA-compliant GHG significance threshold (the "GHG Threshold") based on the substantial evidence gathered during the OII process while concurrently initiating a study of the energy sector's GHG emissions to further refine the GHG Threshold if new information becomes available.

Our proposed approach is responsive to concerns raised by Staff at the second workshop by establishing a clear GHG Threshold for when a project's GHG emissions would be considered significant, and if so, to what degree mitigation would be required to address such an impact. To help maintain consistency with other agencies, our proposed approach is consistent with and draws from key guidance documents on this topic, including:

- California Air Resources Board (CARB), *Preliminary Draft Staff Proposal: Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under the California Environmental Quality Act*, Oct. 2008 (the "CARB Draft CEQA Proposal");

- CARB, *Proposed AB 32 Scoping Plan*, (Oct. 2008) (the “Proposed Scoping Plan”);
- South Coast Air Quality Management District (SCAQMD), *Draft Guidance Document – Interim CEQA Greenhouse Significance Threshold*, Oct. 2008 (the “SCAQMD Draft CEQA Proposal”);
- California Air Pollution Control Officers Association (CAPCOA), *CEQA & Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act*, January 2008 (the “CAPCOA White Paper”); and
- San Diego County, *Draft Interim Guidelines for Determining Significance, Climate Change*, October 2008 (San Diego County Draft Guidelines).¹

Our three-step approach, summarized as follows, is also consistent with the approach jointly proposed by PG&E, SCE and SDG&E during the first round of OII comments:

- **Step 1** – For this first step, the CEC adopts the GHG Threshold by resolution to apply to individual siting cases, basing its decision on evidence gathered during the OII process. The CEC could act quickly at an upcoming meeting, and the GHG Threshold would then apply to pending and future Applications for Certification (AFCs). As discussed below, the GHG Threshold would be based on the Emission Performance Standard (EPS) established in SB 1368 (1,100 lbs of CO₂ per megawatt hour (MWh)) and the application of specific Best Management Practices (BMPs). For projects that meet these standards, a rebuttable presumption would be established that any project GHG emissions would not be cumulatively considerable. If a project cannot comply with the GHG Threshold, then mitigation measures would be required to reduce impacts to less than significant levels (i.e., below the GHG Threshold). Projects would only have to mitigate “interim” GHG emissions before the implementation of AB 32 and no mitigation would be required to the extent the applicant reasonably demonstrates that the proposed project displaces less efficient generation. The CEC would also establish certain categories of energy projects (such as renewable projects) that would be presumed to have a less than significant impact on climate change because the projects significantly advance the State’s long-term GHG reduction goals.
- **Step 2** – Concurrent with Step 1, the CEC initiates a comprehensive study of the energy sector’s GHG emissions. The study would take into account the effects of adding new power plants with different GHG efficiencies and the feasibility of GHG mitigation measures where needed. Opportunities for public comment would be provided. Upon completion of the study, the CEC would modify the GHG Threshold as necessary to conform to any new information that was not

¹ The listed documents are hereby incorporated by reference.

otherwise part of the record, and, if appropriate, establish guidelines for when GHG mitigation should be imposed on new siting projects.

- **Step 3** – For the third step, the CEC reevaluates the GHG Threshold once CARB implements the AB 32 regulations. It is expected that compliance with AB 32’s regulations – which likely will require disproportionately large GHG reductions from the energy sector – will adequately mitigate GHG emissions from power plants in the CEQA context.

II. DISCUSSION

A. Step 1 – Adoption of Interim Significance Threshold for GHG Emissions

1. CEQA Expressly Authorizes the CEC to Adopt Significance Thresholds

CEQA expressly authorizes the CEC, as a lead agency, to adopt significance thresholds. (CEQA Guidelines § 15064.7(a).) Compliance with a significance threshold “means the effect normally will be determined to be less than significant,” although the CEC would retain its discretion to determine otherwise for individual siting cases. (See CEQA Guidelines § 15064.7(a).) The CEC could adopt the GHG Threshold based on the substantial evidence already gathered during the OII process and the public review provided thereby.² (See CEQA Guidelines § 15064.7(b).)

2. Sector-Based Analysis of GHG Emissions is Widely Accepted

Strong support for analyzing GHG emissions under CEQA by “sector,” such as the energy sector, is found in the CARB Draft CEQA Proposal, SCAQMD Draft CEQA Proposal, CAPCOA White Paper, and San Diego County Draft Guidelines. According to the CARB Draft CEQA Proposal:

ARB staff believes that different GHG thresholds of significance may apply to projects in different sectors....We also believe that different types of thresholds – quantitative, qualitative, and performance-based – can apply to different sectors under the premise that the sectors can and must be treated separately given the state of the science and data. A sector-specific approach is consistent with ARB’s Proposed Scoping Plan....

Electricity generation is another sector where clarity is needed in the near term. The California Energy Commission (CEC) recently began a public process for identifying an approach for assessing the significance of GHG emissions from power plant projects.

² If additional public input is required for a specific proposal, the CEC could hold an additional public hearing prior to adopting the GHG Threshold. (See CEQA Guidelines § 15064.7(b).)

(CARB Draft CEQA Proposal, pp. 4-5; *see also* SCAQMD Draft CEQA Proposal, pp. 3-16 [calling for the creation of sector-based performance standards]; CAPCOA White Paper, pp. 34 [supporting the evaluation of GHG emissions by sector]; San Diego County Draft Guidelines, pp. 11-12 [taking a sector-based approach to addressing GHG emissions].) When considering the energy sector as a whole, it is important to recognize that it is unique from other sectors. Unlike other projects that move forward independently under different local jurisdictions, *all* thermal energy projects over 50 MW in California fall under the CEC's jurisdiction, giving the CEC greater control over the sector and an enhanced ability to gather information about sector-wide impacts and benefits. Furthermore, strong evidence supports a finding that new power plant generation displaces less efficient generation from older in-state power plants or dirtier out-of-state power plants with a certainty that cannot be replicated in other sectors. (*See, e.g.* the Independent Energy Producers first-round written comments and oral comments made at the second OII workshop.)

Moreover, the energy sector will likely carry a *disproportionately large* obligation to reduce California's GHG emissions under AB 32. According to the CARB's Final Scoping Plan, the energy sector is expected to account for approximately 40 percent of the State's GHG emissions reductions even though it currently only accounts for approximately 25 percent of such emissions. (*See* Proposed Scoping Plan, p. 17; *see also* CEC and California Public Utilities Commission, *Proposed Final Opinion Summary: On Greenhouse Gas Regulatory Strategies* (Sept. 2008), p. 1.)

3. Non-Zero Threshold is Widely Accepted

The application of a "*non zero threshold*" for determining the significance of GHG emissions in the CEQA context is widely accepted and supported by the CARB Draft CEQA Proposal, SCAQMD Draft CEQA Proposal, CAPCOA White Paper, and San Diego County Draft Guidelines. According to the CARB Draft CEQA Proposal:

Some have suggested that because of the need for urgent action and the uncertainty of the precise "tipping point" for dangerous climate change, any contribution of GHGs to the atmosphere may be significant – a so-called "zero threshold."

ARB staff believes that...non-zero thresholds can be supported by substantial evidence. ARB staff believes that zero thresholds are not mandated in light of the fact that (1) some level of emissions in the near term and at mid-century is still consistent with climate stabilization and (2) current and anticipated regulations and programs apart from CEQA (e.g., AB 32, the Pavley vehicle regulations, the Renewable Portfolio Standard, the California Solar Initiative, and the commitment to net-zero-energy buildings by 2020 (residential) and 2030 (commercial)) will proliferate and increasingly will reduce the GHG contributions of past, present, and future projects.

(CARB Draft CEQA Proposal, p. 4; *see also* SCAQMD Draft CEQA Proposal, pp. 3-1 – 3-16; CAPCOA White Paper, pp. 31-58; San Diego County Draft Guidelines, pp. 11-12.) Similarly, the CEC can establish a non-zero threshold based on the best evidence currently available.

A zero threshold is not appropriate for the CEC's siting process. If a zero threshold were applied, mitigation would be required for some projects that likely would result in a *net decrease* in GHG emissions (such as a renewable project) by displacing or replacing less efficient sources of generation. If the mitigation requirements are too onerous, the CEC could end up discouraging the development of more efficient power plants, which would perversely make the State's GHG reduction goals that much harder to obtain.

Furthermore, a zero threshold may be inconsistent with AB 32 by potentially requiring inconsistent or duplicative regulation on the energy sector that may ultimately discourage the development of more efficient power plants while undermining the electric grid's reliability as a whole. (*See* Health and Safety Code § 38501(g) ["It is the intent of the Legislature that...electricity and natural gas providers are not required to meet duplicative or inconsistent regulatory requirement"]; Health and Safety Code § 38501(h) ["It is the intent of the Legislature that...emissions reduction measures to meet the statewide emissions limits for greenhouse gases... improves and modernizes California's energy infrastructure and maintains electric system reliability"].)

4. A GHG Threshold Based on the EPS and BMPs is Most Consistent With CEQA Based on Information Currently Available

The Emissions Performance Standard (EPS) established by the CEC in conjunction with the California Public Utilities Commission (CPUC) pursuant to the mandate of Senate Bill 1368 (2006) is the appropriate operational performance standard for determining which power plant projects would have a cumulatively considerable contribution to global warming because the California Legislature enacted SB 1368 to reduce the impact of GHG emissions from the energy sector before the implementation of AB 32. (*See* SB 1368 § 1(a), (d), and (h)).³ A more stringent standard could contravene the Legislature's express intent under AB 32 by possibly undermining the reliability of the State's electric grid by discouraging the development of new, more efficient power plants. (*See* Health and Safety Code § 38501(h) ["It is the intent of the Legislature that...emissions reduction measures to meet the statewide emissions limits for greenhouse gases... improves and modernizes California's energy infrastructure and maintains electric system reliability"].)

Projects would also have to comply with a set of Best Management Practices (BMPs) to minimize GHG emissions during construction and for ongoing operational-support activities in

³ The "establishment of...an emissions performance standard...is logical and necessary step to meet the goals...for reduction of emissions of greenhouse gases." SB 1368 § 1(h). Moreover, because "[g]lobal warming will have serious adverse consequences on the economy, health and environment of California...[t]o the extent energy efficiency and renewable resources are unable to satisfy increasing energy and capacity needs...the state will rely on clean and efficient fossil fuel fired generation...to provide reliability and consistency with the state's energy priorities."

order to fall below the significance threshold. For projects that meet the EPS and adopt the BMPs, no further mitigation would be required unless the CEC determined it was necessary based on information unique to that power plant.

CEQA expressly authorizes the CEC, as a lead agency, to adopt significance thresholds based on performance standards such as the EPS. (*See* CEQA Guidelines § 15064.7(a).) It is common for lead agencies to use performance standards adopted in a separate regulatory context when determining the significance of a project impact under CEQA, and a project's compliance with the standard can be presumed to provide an adequate level of protection for the environmental resources in question. *See, e.g., Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal. App. 4th 74, 106; *Riverwatch v. County of San Diego* (1999) 76 Cal. App. 4th 1428, 1453. Projects that are exempted from complying with SB 1368 should be presumed to have a less than significant cumulative GHG impact because they likely improve the energy sector's efficiency by supporting renewable energy development or displacing older generation.

If a project cannot meet the GHG Threshold, the project's GHG emissions would have to be mitigated to a less than significant level (i.e., below the GHG Threshold). If mitigation is required, it should only apply to GHG emissions during the "interim" period before AB 32 regulations are implemented. To comply with AB 32, it is imperative that a power plant not be required to "double mitigate" its GHG emissions. (*See* Health and Safety Code § 38501(g) ["It is the intent of the Legislature that...electricity and natural gas providers are not required to meet duplicative or inconsistent regulatory requirement"].)

Further, the applicant should be allowed to reduce its mitigation obligation by showing that the proposed project would actually displace less efficient generation (i.e., from older, dirtier power plants). If the applicant can make a reasonable showing based on substantial evidence that the proposed project will result in a net displacement of energy, then the applicant should not be required to mitigate GHG emissions that will be displaced. This approach of "netting" new pollution emissions is commonly applied in the context of the Clean Air Act and the displacement principle for GHG emissions has been previously applied by the California Attorney General's office and the SCAQMD for proposed industrial projects. (*See, e.g.,* Final Environmental Impact Report for Chevron Products Company El Segundo Refinery Product Reliability and Optimization Project, P. 5-12 – 5-28; ConocoPhillips Company Settlement with California Attorney General (September 10, 2007), § 1(a).)

5. "Green List" Projects are Presumptively Considered to Have a Less Than Significant Impact on Climate Change

Lastly, the CAPCOA White Paper describes how a lead agency can create a "Green List" of projects that would be deemed to have a "positive contribution to California's efforts to reduce GHG emissions." (*Id.* at p. 40.) As part of Step 1, the CEC can adopt such a Green List and include the following types of projects because they almost certainly would result in a net decrease in GHG emissions or improved energy efficiency for the energy sector as a whole:

- Projects that satisfy the Renewable Portfolio Standard (PRS) requirements.

- Peaker plants that support renewable generation, increase grid reliability or displace older inefficient generation (if not otherwise exempted, as described above).
- Modifications that improve the efficiency of an existing electric generating facility by reducing the amount of GHG emissions produced per MWh.
- Projects with GHG emissions below a *de minimus* standard established by CARB.

B. Step 2 – Completion of Sector-Wide Study and Refinement of GHG Threshold

Concurrent with the implementation of the GHG Threshold, the CEC would initiate a study of the energy sector's GHG emissions (under CEC jurisdiction). The study would consider how such emissions are affected by the siting of new power plants and the feasibility of GHG mitigation where applicable. Opportunities for public comment would be provided. It is our understanding that PG&E, SCE and SDG&E plan to jointly propose how such a study could be prepared.

Based on our understanding of CEQA, the CEC must evaluate GHG emissions from new plants in the CEQA context by determining whether there is a *net increase* in emissions to determine if a project's GHG emissions are cumulatively considerable. For an analogous example in a different CEQA context, lead agencies evaluate a project's impact on a cumulative traffic impact by whether the project decreases the level of service at key intersections by a significant amount and not based on the gross number of vehicle trips associated with the project. It is not uncommon for a project to result in a less than significant traffic impact even if new vehicle trips are added to a highly congested area because the project either results in a *net decrease* in actual vehicle trips or includes infrastructure enhancements that improve the underlying traffic problem. (See CAPCOA White Paper, p. 35.) Similarly, if a new power plant displaces GHG emissions from older or less efficient power plants, or improves the energy efficiency of the energy sector as a whole, the new power plant would not be causing a cumulatively considerable contribution to climate change.

CEQA does not mandate that *every* contribution to a significant impact be deemed *cumulatively considerable*. CEQA Guidelines § 15064(h)(4) states that "[t]he mere existence of significant cumulative impacts caused by other projects alone shall not constitute substantial evidence that the proposed project's incremental effects are cumulatively considerable." In other words, it is not necessarily true that any level of incremental contribution must be deemed cumulatively considerable, even where cumulative impacts are significant. *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 120; *see also Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 718.

Once the sector-wide study is completed, the CEC can revise or supplement the GHG Threshold based on any new information not already available in the record.

C. Stage 3 – Review of GHG Threshold Following Implementation of AB 32 Regulations

For the third step, the CEC would reevaluate the GHG Threshold once CARB implements the AB 32 regulations. It is expected that compliance with AB 32's regulations will adequately mitigate GHG emissions from power plants in the CEQA context. In fact, the energy sector will likely carry a *disproportionately large* obligation to reduce California's GHG emissions under AB 32. According to the CARB's Proposed Scoping Plan, the energy sector is expected to account for approximately 40 percent of the State's GHG emissions reductions even though it currently only accounts for approximately 25 percent of such emissions. (*See Proposed Scoping Plan*, p. 17; *see also* CEC and California Public Utilities Commission, *Proposed Final Opinion Summary: On Greenhouse Gas Regulatory Strategies* (Sept. 2008), p. 1.)

Again, we appreciate the opportunity to comment on the OII and look forward to working with the CEC to develop the proper framework for addressing GHG emissions during the CEC's CEQA-equivalent licensing process.

Respectfully submitted,

/S/ MICHAEL CARROLL

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